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BACHELOR THESIS

Analysis of decision making of the Czech Office for the Protection of Competition in public procurement cases

Author: Tomáš Ducháček

Supervisor: PhDr. Jan Soudek

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Declaration of Authorship

The author hereby proclaims that he compiled this bachelor thesis independently under leadership of supervisor, using only the listed resources and literature that have been properly cited. This thesis was not used to obtain another academic degree.

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Prague, July 27, 2015

Signature

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Abstract

This thesis analyzes the decision making of the Czech Office for the Protection of Competition in public procurement cases. It deals with both procurement oversight and the underlying incentives of the participants of proceedings. The aim of this thesis is to show the motivation of participants of proceedings is various and it often differs from the initial purpose of the oversight. The decisions of the Office and the length of proceeding before the Office play an important role in the incentives of participants.

First, the author summarizes the legislative framework of the proceeding before the Office with emphasis on economically important aspects. Then he performs the analysis of the decisions. The results show that the length of proceeding before the Office is quite long and both contracting authorities and petitioners respond to this fact. The contracting authorities tend to cancel the procurement or make a deal even during the proceeding, on the other hand some the petitioners submit frivolous proposals. In addition the fines imposed by the Office are rather on lower boundary.

JEL Classification	H57, K21
Keywords	public procurement, procurement oversight, protest, frivolous proposal, length of the proceeding, deposit

Author's email	tomasduchacek@ymail.com
Supervisor's email	honza.soudek@gmail.com

Abstrakt

Tato práce analyzuje rozhodování Úřadu pro ochranu hospodářské soutěže v oblasti veřejných zakázek. Zabývá se jak samotným dohledem nad dodržováním zákona o veřejných zakázkách, tak skrytými podněty účastníků řízení. Cílem práce je ukázat, že motivace účastníků řízení je různá a mnohdy se může lišit od původního účelu dohledu. Velkou roli v tom hraje sám úřad, především jeho rozhodovací praxe a délka řízení.

Autor nejprve shrnuje legislativní rámec řízení před úřadem a jeho z pohledu ekonomie důležité prvky, následně provádí samotnou analýzu. Výsledky ukazují, že délka řízení před úřadem je velmi dlouhá. Na to reagují jak zadavatelé, kteří v průběhu řízení ruší zakázky nebo naopak uzavírají smlouvy, tak navrhovatelé, již využívají tohoto faktu k účelovým návrhům. Navíc případné pokuty udělované úřadem jsou spíše na spodní hranici.

Klasifikace	H57, K21
Klíčová slova	veřejné zakázky, dohled nad veřejnými zakázkami, protest, šikanozní návrh, délka řízení, kauce

E-mail autora	tomasduchacek@ymail.com
E-mail supervizora	honza.soudek@gmail.com

Bachelor Thesis Proposal

Author Tomáš Ducháček

Supervisor PhDr. Jan Soudek

Proposed topic Analysis of decision making of the Czech Office for the Protection of Competition in public procurement cases

Topic characteristics One of the purposes of the Czech Office for the Protection of Competition is to oversee the compliance with the law of public procurement. The administrative procedure at the Antimonopoly Office can be started both upon own initiative of the Office and upon the request of the participant of public procurement, who believes the law of public procurement was breached. For both the Office and the participants the right to initialize the administrative procedure is very powerful tool against restricting competition. In my thesis I would like to focus on the activity of the Office in the public procurement cases. I would like to analyze whether on one hand the Office has enough capacity to resolve all the cases and if it uses its power sufficiently, on the other hand I would like to investigate possible overuse of right to turn to the Office by the competitors in order to limit competition.

Data sources:

http://www.uohs.cz/en/homepage.html

http://www.vestnikverejnychzakazek.cz/

https://www.profilzadavatele.cz/

own search on websites

Hypothesis

1) The majority of decision making of the office is procedural rather than on merits.

2) The remedies imposed by the Office are on the lower border of their competencies.

3) The probability of successful appeal within the Office is lower than 50%.

4) The competitor who initializes the administrative procedure is willing to participate in the process and to cooperate with the Office by satisfying all the legal conditions – mainly by paying the refundable deposit and by providing all the important documents.

Methodology Firstly, I am going to discuss the relevant literature, with main focus on decision making of the Office and with proposals how to make the administrative procedures more efficient. The brief description of the Czech legal framework of public procurement and of the Czech Office for the Protection of Competition would follow.

In order to test the proposed hypothesis I am going to analyze selected decisions of the Office. I am going to focus on group of decisions in public procurement cases, where the contracting authorities are the cities with 20 000 inhabitants plus. The data come from recent years.

The main outcome of rulings analysis would be whether there were detected the breach of public procurement law, on which side the infringement was detected, if the decision of the Office was procedural or substantive (on merits) and whether there was used successful appeal.

Outline

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1. Introduction

Through the public procurement procedure there are spent hundreds of billions CZK every year in the Czech Republic. The aim of the public procurement is to purchase some goods or services, ideally with low costs, high quality and without unnecessary delay. This optimal situation should be reached through the competition among the suppliers. In order to ensure achievement of the competition in the situations in which it is possible, the corresponding law states the rules that have to be followed during the procurement procedure. In addition there is an authority (in the Czech Republic it is the Office for the Protection of Competition) that supervises compliance of relevant parties with this law. However, this supervision becomes slightly problematic, if it starts to excessively influence the procurement procedure, if it can be bypassed and if it becomes a tool of competitive struggle among economical players. The complications may be primarily caused by the (questionable) decision making of the Office and undue length of proceeding.

The aim of this thesis is to inquire the motivations and incentives of the participants of proceedings based on the analysis of real decisions of the Office. The behaviour of those participants has real economic impacts on both the participants and on the whole system of public procurement. The real length of proceeding before the Office is also examined as it strongly influences many aspects and the Office has been criticized for pointless delays for quite long time. I am especially interested in the relation between underlying reason for decision and the length. Last but not least, the remedies imposed by the Office in cases of revealed misconducts are also in my concern, mainly the fines and their sizes in relation to their maximum limits. The thesis may be used as a contribution into discussion about modification of running of the Office, especially with regards to the plans for the new public procurement law.

The thesis is divided into 6 chapters. After the introduction, the literature review is proposed in Chapter 2. The Chapter 3 summarizes legislative framework and the theory of the procurement oversight. In the Chapter 4 the two datasets and the

methods used in the empirical section are described. The Chapter 5 deals with the analysis itself and the results of my inquiry are presented there. Finally, the Chapter 6 contains the conclusion and the discussion about the results.

2. Literature review

The topic of review mechanism of public procurement is a mixture of law and economics so the literature comes from both sides. The legal studies describe the problem usually more theoretically, they point out the key aspects that have to be set in the system or key problems (mainly legal problems) the system is facing. On the other hand, the sources from economic field try to emphasize the incentives and motivations of the actors, they work with specific numbers and think more about the impacts on the real economy.

Marshall, Meurer, Richard (1991) emphasize the positive impacts of protest as a decentralised mechanism for oversight (contrary to centralised one, for example an audit). They are aware of the fact that contracting authorities have very often different incentives from the incentives of the taxpayers (principal agent problem) so the oversight mechanism is highly needed. Gordon (2006) in his study summarizes the crucial questions of the review mechanism that have to be decided. The mechanism faces a trade off between a deep examination of potential fault and a non-delaying of procurement. The problem of time limits (both for submission of a proposal and for decision-making of the arbiter) falls under this trade off. The mentioned arbiter can be represented by an independent office, the contracting authority itself or by a court. In his later study from 2013 Gordon reminds the fact that the protests are not so common as it could seem. It is important to see the numbers of protests in relation to volume of procurement (total numbers of sum of spent money) and in that way the protest is quite rare. Furthermore, even the risk of frivolous protest cannot overweight the benefits of the review, not mentioning the problem of recognition of frivolous protest, so any measures against the threat of frivolous proposal is redundant. Chýle (2014) stresses the speed of decision-making by the Office. He pays attention to the background of high percentage of procurement – very often they are connected with subsidies from the EU budget and such subsidies are endangered by the delay. He also asks whether the appeal is effective, or it only disproportionately extends the time for final decision.

The study of Lennerfors (2006) is based on the situation in Sweden. The author presents another trade-off in this field – between a rigidity in order to minimize a space for corruption and flexibility for decisions (which increases the corruption potential). He proposes a real example from Sweden, where procurement of tax collector was delayed due to the protest and the costs were easily counted as the non-collected tax. The study also confirms the idea that the contracting authorities tend to prefer more transparent specifications and criterions (like the minimum price) in order to evade the protests. Tsai (2014) in his work looks at the problem of protest through benefits and costs. On the side of benefits for the petitioner he mentions a possible relief, a gain of information or damage to contracting authority and other parties, whereas among the costs he counts only a loss in the reputation and possible revenge from other actors of the dispute. The protest will occur unless the cost prevail the benefit.

3. Theoretical part

In this chapter I briefly discuss the fundamental points of Czech legislative framework with emphasis on economically important aspects (especially deposit and frivolous proposal). In the end of the chapter I mention some other variants of the institutional position or other options for the scope of the powers of the Office.

3.1. Position of the Office for Protection of Competition

The role of the Czech Office for Protection of Competition is to supervise compliance of all relevant parties with the relevant law – mainly public procurement act. This act includes several specific requirements - some of them are quite general, such as principal of transparency, non-discrimination and equal treatment from the side of contracting authority, most of them are much more concrete. Anyway, the Office represents the institution where the disadvantaged supplier or other party brings her complaint and seeks a remedy. The Office thus behaves as a state arbiter of legal practise in public procurement.

3.2. Fundamental points of legislative framework

The Czech Antimonopoly Office was established in 1991 (by Act No. 173/1991 Coll.). At that time the office was called the Czech Office for Economic Competition, but since 1996 the office has its current name – the Office for the Protection of Competition.[1] The name came with the Act No. 273/1996 Coll. that also stated the scope of authority of the Office. The act with some amendments is still in power and it constitutes the basic organisation of the Office. Among other responsibilities specified in specific laws, the Office is in charge of two important fields – setting conditions for a protection of

[1] *History of the Office*, the webpage of the Office. http://www.uohs.cz/cs/o-uradu/historie-uradu.html.

economic competition and supervision of public procurement. In this thesis I will concentrate on the second task – supervision of public procurement.

The process before the Office is a special type of an administrative procedure which is generally regulated by the Administrative Procedure Act. It is in a subsidiary position towards other acts, so the Administrative Procedure Act is used whenever the particular question is not answered by another law. One of the regulations stated in the act is the maximum length of the administrative procedure. The office has up to 30 days to decide the case and in case of complex question, the period can be extended by another 30 days (Act No. 500/2004 Coll., Article 71 (3)). As it will be shown later, a satisfaction of these time requirements is not always natural in reality.

If I consider only the field of public procurement, for the real running of the Office the most important and essential law is the Act No. 137/2006 Coll. Government Procurement Act ("Government Procurement Act"). Basically, it describes the rules that have to be met by the contracting authority in the process of public procurement, it states who is obliged to comply with those rules and under such circumstances and it also covers protection against incorrect steps of the contracting authority. And just in this field of protection the Office plays the key role. The following Figure 3.1 captures the basic steps that have to be taken in order to examine potential fault based on the proposal of petitioner.

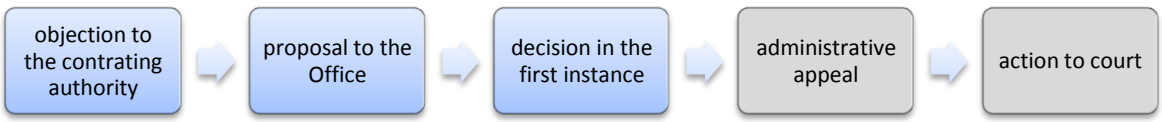

Figure 3.1 Steps in the process of protection against misconduct of contracting authority based on proposal

3.2.1. Objection

If a contractor, in whose interest is to obtain public procurement, is convinced about existing fault of a contracting authority during the process of public procurement, he is allowed to fill an objection to the contracting authority (Government Procurement Act, Article 110). The contracting authority is the first instance to decide whether there really occurred some fault. It works as a sort of auto-remedy, in which the authority decides about its own potential fault and alternatively it carries out a redress. The form of the redress varies according to the discovered fault – in conformity with principles of public procurement the remedy should minimize the harm to the actors of procurement. The specific measures are not stated in the law, but generally the contracting authority cancels appropriate action(s) and carries out the action(s) again or, if it is not possible, the whole public procurement has to be cancelled and announced once more.

In the objection there has to be primarily stated in which action of contracting authority the contractor sees breach of law. It can be seen in many actions, such as choice of the best tender, exclusion of a tender from the procurement or assessment of contractor's qualification, and according to the type of action, there are appropriate time limits for filling the objection. They vary from 5 days to 30 days and they represent trade-off between certainty of contracting authority that the procurement can be finished without objection and right of contractor to legitimate process. The submission of an objection is necessary requirement to submit a proposal to the Office.

3.2.2. Proposal

The Office is the first independent institution before which the contractor can seek remedy. The proposal[2] can be aimed against any action of the contracting authority that can breach the principles of public procurement named in the law and as a result

[2] From the terminological point of view the term "proposal" is the closest one to the Czech term "návrh". But in other countries it can be also called "appeal" or "protest".

of such action there is a danger of harm for a petitioner[3]. As for the objection, there are several requirements – once again the proposal primarily has to contain alleged statement of fault, now accompanied with evidence in favour of the statement and the proposal must be submitted during the given time period (Government Procurement Act, Article 114). In addition, the proposal is an official submission to the Office, so it has to meet general requirements of such submission stated in Administrative Procedure Act. Moreover, there is an obligation to pay a deposit to the Office. The goal of this institute is to limit unjustified or even speculative proposals (Kolman, 2014). On one hand its size has to be high enough to be able to fulfil this role, on the other hand the deposit cannot make the right to submit a proposal impossible. More about this institute will be in the following section 3.3.1.

3.2.3. Decision in the first instance

The result of the proceeding is the decision of the Office. Generally, the decision can have 3 different forms – the Office can stop the proceeding (for the reasons in Government Procurement Act, Article 117a - such as the deposit to the Office was not paid, the lime limits for proposal have passed or the proposal contains some serious imperfections - or because of withdrawal of the proposal[4]), reject the proposal[5] (typically for not finding any error) or sustain the proposal and impose some remedy. The proceeding is usually stopped due to the procedural reasons, often connected with some defect of the proposal, which should be found out in a few days since the start of the proceeding. It serves as an automatic defence of the Office against improper proposals and such decisions are count into non-merits (or procedural) group of decisions. The proposal is sustained if the Office discovers a fault of the contracting authority. In such situations the Office imposes appropriate corrective measures, unless there are any reasons worthy of special consideration. As a reaction to the fault (not considered as an administrative offence, more about them later), the

[3] A petitioner is a person who submits a proposal.

[4] Administrative Procedure Act, Article 45 (4).

[5] Government Procurement Act, Article 118 (5).

Office can cancel individual action of contracting authority or the whole public procurement. In both cases (proposal rejected or sustained) the decision is an example of decisions on merits. In these cases the Office decides about the case itself, so the participants of the process really know whether there has been any fault (contrary to the procedural decisions).

3.2.4. Administrative appeal

An administrative appeal is a corrective measure that still takes place in the system of administrative procedure (contrary to the next corrective measure, the action to court). It serves as a review of the decision of the first instance in cases when any of the participants is dissatisfied with the decision. The president of the Office decides about the administrative appeal based on an opinion of an appeal committee. He can abolish the decision and return it back to the first instance for a new hearing, he can change the decision (especially in cases of mere, rather technical errors) or the president can reject the appeal. Beside the role of review, the administrative appeal should also serve as a tool to unify the decision-making of the Office and to increase predictability. The decisions of the first instance are prepared by different clerks and sometimes the cases with similar aspects have diverse resolutions. Then it is a task for the president to maintain uniformity in decision-making.

Because of that, it is convenient to track the percentage of successful appeals. On one hand, the high percentage signifies high number of errors in the first instance, which is not positive for reputation of the Office, on the other hand, too low percentage can indicate that administrative appeal is useless tool that works only as a way how to extend the length of the procedure.

3.2.5. Action to court

If the participant of the process before the Office is convinced that the decision of the Office is unlawful, he can bring the case before the court to seek the remedy. The defendant in that case is the Office itself. This right is the ultimate tool in the

procedure and the court can reject the action, or abolish the decision of the Office and return the case to the Office with binding opinion. Only a small portion of disputes before the Office shows up before the court and all of them have one similarity – very long past time since the start of the proceeding.

3.2.6. Proceedings ex officio

Beside the initiation of the procedure before the Office based on the proposal, the Office can also start the review proceedings based on her own decision, so called ex officio or ex offo. The incentives for those proceedings are usually public initiative, information from media or own investigation of the Office. The scheme of procedure started ex officio (Figure 3.2) looks quite similar to previous one.

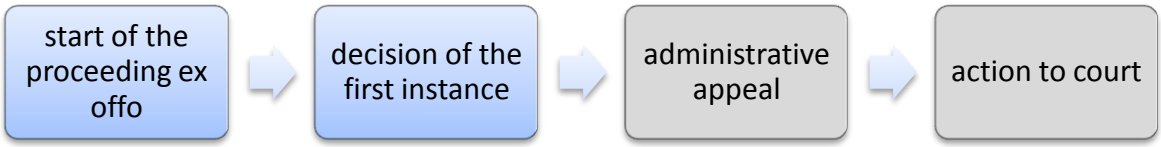

Figure 3.2 Steps of the proceeding started ex offo

One of the most important differences (beside the absence of proposal) is in the scope of possible investigation. In the proceeding ex offo the Office typically investigates the administrative offences. These offences are listed in the Government Procurement Act, Article 120 (1) and among them it can be found for example setting a contract contrary to the requirements of the act, improper handling objections or unlawful cancellation of public procurement. Majority of the administrative offences are investigated only ex officio, because many of them cannot be object of the proposal (for example when the contracting authority does not observe the law during a public procurement and the contract is already made). That is the reason why the Office also has to perform her own investigation as otherwise most of the

administrative offences would remain unpunished. The punishment for the administrative offence is a fine. Its maximal size differs according to the form of administrative offence and the Office also has to take into account the circumstances of the case, the value of the public procurement or the financial abilities of the contracting authority.

On the other hand, one of the powers of the Office cannot be used without adequate proposal – the Office may impose the prohibition on performance of contract only based on the proposal[6]. This power has not been used very often so far.

3.3. Profound analysis of selected aspects of review mechanism

3.3.1. Deposit

At the time of submission of a proposal, there is also an obligation to pay a deposit. As it was said, the goal of this institute is to limit calculated and groundless proposals (Krumbholc, Machurek, 2012). The deposit can be seen as a sort of fee in order to use the review mechanism. The result of the review is the decision of the Office - which can be generally in favour of the petitioner or not in favour of him and based on that the deposit is returned or not. The key questions are about size of this fee (is it worth paying this fee, or the potential gain is too low or too improbable?) and about rules concerning this fee[7] (especially concerning the possibility to obtain the deposit back). The size is basically counted as a share of a supplier's offer price with some minimum and maximum limits. These limits are quite stable through the time[8]. The logic behind the rules is also constant – if the petitioner is right (and the fault of the contracting

[6] Government Procurement Act, Article 118 (2).

[7] The deposit returned back to the petition is his only monetary gain which is in the stake, as there is no monetary compensation for the petitioner in consideration before the Office. Any potential monetary claim against the contracting authority has to be claimed before the court.

[8] Beside the last amendment of Government Procurement Act from 2015 which increased the upper limit from 2 mil. CZK to 10 mil. CZK.

authority is found), he so-called wins his case and he receives the deposit back. However, the administrative procedure is slightly complicated and the participants are innovative. Their motivation is clear – they do not want to lose (waste the deposit) even in the case there is no fault. Such effort could be seen in a following practise: the petitioner has "lost" the case in the first instance, so he submits an administrative appeal and then he withdraws the proposal (that can be even done in a single submission). Due to that, there is no legally effective decision and the deposit has to be returned. Nevertheless, these practises were stopped by one of the amendments of Government Procurement Act in 2012. Furthermore, the participant of the proceeding has a right to look at the administrative file and use the information written there (especially about the contracting authority and other possible participants of procurement). It means that he has an incentive to obtain such a status of participant of proceeding – thus he submits a proposal and after that he can really decide whether there is possibility to "win" the case before the Office and whether he wants to continue in the proceeding. If not, the petitioner can withdraw his proposal and receive the deposit back. However, in order to limit the motivation for such behaviour, the recent amendment of the act from 2015 stated that in the case of withdrawn proposal before any decision is made, the deposit is returned only from 80%.

3.3.2. Frivolous proposal

The institute of deposit and the practise of not returning the deposit in full are closely connected to the so called frivolous proposals. A frivolous proposal "*is deemed as a frivolous if it clearly lacks any merit or is filed solely to disrupt the procurement process"* (Beaumont, 2005). Although all participants of procurement are expected to behave with certain amount of ethics, such behaviour does not often correspond to best economic strategy (Moorhouse, Jack, 2011).

The use of the review mechanism does not have to be motivated only by its initial purpose, but the petitioners can have some other incentives – they can vary from mere revenge of loosing supplier for not being chosen, to more complicated strategy of supplier who wants to have some space for backstage negotiation with contracting

authority (Gordon, 2006). Strong incentive for frivolous proposal is present at the current supplier of some service whose contract is going to expire. Unless the contracting authority carries out the procurement, it is forced to prolong the contract with the current supplier – so the supplier is highly motivated to hinder the process by any means and to bring the contracting authority into time pressure. Another incentive for frivolous proposal is hidden in an institute of automatic stay (Government Procurement Act, Article 111 (5)). If there is a proposal submitted by the Office, the contracting authority automatically cannot enter into a contract until 45 days since the delivery of the objections have passed (that is approximately 30 days since the start of the proceeding before the Office which corresponds to the deadline that the Office has for its decision according to the Administrative Procedure Act). In addition, the Office may extend this period of 45 days by instrument of preliminary injunction up to the moment of decision. On the other hand, for example in the United States the automatic stay provision is in force up to the moment of decision of the arbiter, unless there are some crucial reasons for not enforcing this provision.

Anyway, the primary result of such frivolous proposal is a delay in the procurement which can be highly negative for the contracting authority – particularly if it is an addressee of a subsidy from the EU funds[9]. Furthermore, the defence against the frivolous proposals tends to be not very easy for the contracting authorities. It can be even said that they seem to become risk averse in relation to every protest[10] as it usually causes uncertainty about the result of the proceeding and delay in the procurement. As a result of that the contracting authorities are trying to avoid unnecessary risk, for example they tend to prefer specific types of public procurement or more simple evaluation criterions.

[9] There are usually very strict timelines for procurement if it is financed through the EU funds and if the contracting authority is not able to follow them, the subsidy can be cancelled.

[10] Although the key source of risk aversion is a threat of auditors and penalties and a threat of non-awarding potential future subsidy.

3.4. Other variants of the procurement oversight by the antimonopoly authority

At this point a brief discussion of some other variants how the procurement oversight system can look like follows.

The Czech Office for Protection of Competition is an independent administrative office. But in many states abroad (for example in Austria, Germany or in United Kingdom) the tasks of the Office are carried out by general or separate courts. The process before the court tends to be more rigid and not so concentrated, on the other hand the decisions of the independent administrative office have to be reviewable by courts (according to European directive 89/665/EEC) and that can extend the procedure even more. Especially in the EU the quasi-judicial office can be also used – it still has advantages of the special office, but contrary to other offices it can use the institute of preliminary ruling before the European Court of Justice.

The procedure before the office can be set as single-stage or double-stage with possibility to appeal – that is the case of the Czech Office. The second stage offers another chance to reverse the decision of the first instance and to unify the decision making, on the other hand the process takes even more time.

Finally, the oversight by an arbiter can have significantly different intensity. As it is true for example for the Czech Republic, the Office may only examine the case from the formal point of view[11], whether there were observed all the legal procedures. Contrary to that, in some other countries (for example in Poland) the arbiter may examine not only the formal side of the case, but also the efficiency of the whole procurement.

[11] As it was stated for example by the High Court in Olomouc in 17.6.1999 in his decision 2A1/99.

4. Data and methods

In the next section, I am going to analyze the real decisions made by the Office. My dataset for the analysis consists of two parts based on the nature of contracting authority. The decisions in cases where the contracting authority is a municipality with equal or more than 20000 inhabitants and where the proceeding started in the period of years 2011-2013 constitute one part (further called "municipality dataset"), the second one is composed of decisions with public administrative body as a contracting authority and with the beginning of proceeding between years 2012 and 2014 (further called "administration dataset"). The decisions of the Office were taken from the website of this institution by the automatic computer tool[12] and manually treated, completed and divided. They are primarily sorted into two groups – decisions on merits and procedural decisions. Among the procedural decisions I also distinguish the cases according to the reason for a ruling: the proposal was withdrawn, the deposit was not paid, the proceeding has become unfounded, the proposal was not delivered in time, the proposal was submitted by an unauthorised person or the proposal is unacceptable. The decisions on merits are separated into two groups – whether there was found a fault (in that case I am also interested in the particular fault and type of redress or penalty) or not.

In addition, the length of the proceeding is also in my interest. I define this length as a number of elapsed days since the submission of a proposal (or since the start of the proceeding ex officio) until the release date of the decision. In order to analyze various aspects of the proceeding (like for example occurrence of an appeal or the type of decision) on the length of the proceeding I am going to use multiple variable model and OLS regression. Finally, I study the frequency of usage of right to appeal and success rate of those appeals together with the potential actions to court.

[12] I would like to thank PhDr. Ing. Jiří Skuhrovec for the data.

5. Empirical part

Chapter 5 deals with the results of my analysis based on the two mentioned datasets. I present the numbers about decisions of the Office and their distribution based on the underlying reason for the decision. Next, I discuss motivation and incentives of participants of the proceedings based on my findings. Then I examine the length of the proceeding. In the end of the chapter I mention the success rate of appeal and success rate of action to court.

5.1. Basic facts about the public procurement and its oversight by the Office

Before the analysis of the datasets I will present some basic numbers about the amount of public procurement carried out in the Czech Republic and about the size of the oversight before the Office in order to obtain an overall understanding of picture.

Year	Number of PC	Number of proceedings
2011	12414	530
2012	15588	650
2013	22281	668
2014	20431	981

Figure 5.1 Number of public contracts (PC) and number of proceedings before the Office

Sources: www.vsechny zakazky.cz, www.uohs.cz

The number of proceedings describes the quantity of proceedings in the first instance that have been initiated in the corresponding year. Although the exact numbers of public contracts can differentiate among different sources of data and despite the possible lag between the announcement of the procurement and the conclusion of it and between the initiation of the proceeding and the moment of

publication of decision, the message from these numbers is quite clear. The share of reviewed procurement varies between 3-5%. So the vast majority of public procurement remains without the oversight from the Office. Furthermore, in addition to the numbers in the table there is not easily countable, but definitely not negligible portion of public procurement (called "public procurement of small extent") that does not fall under the Government Procurement Act and because of that the Office does not provide the oversight to this type of procurement at all[13]. There was unsuccessful effort supported by many experts (Pavel, 2007) to move some part of this category of procurement into another category which is already subject to the oversight. On one hand it is easy was to enlarge the extent of oversight by the Office, on the other hand even at this moment the Office seems to be overloaded and slow, let alone with another large portion of proposals.

So if I consider the total volume of public procurement in the Czech Republic, less than 3% of them are examined before the Office.

5.2. Structure of decisions by the Office

The "municipality dataset" contains 142 decisions and the "administration dataset" contains 344 decisions. In all examples the final decision of the case was taken (whether it was from the first instance or after the appeal) unless it was not published yet (at that time the latest decision was used). The findings of the analysis are presented in the following section.

[13] Nevertheless, there are discussions and sometimes even disputes whether the Office is really not allowed to review also the procurement of small extent. So far, the Office has been resistant to this opinion.

5.2.1. "Municipality" and "administration" datasets

Figures 5.2 and 5.3 capture the distribution of decisions in the "municipality dataset" and "administration dataset" respectively. The numbers come from my own analysis.

Municipality dataset

number of decisions: 142	
decisions on merits: 59	procedural decisions: 83
- proposal by unauthorised person: 3	- withdrawal of proposal: 44
- faultless: 12	- unfounded proceeding: 18
- found misconduct: 44	- deposit not paid: 15
• imposed fine: 13	- not delivered in time: 6
• cancelled public procurement: 16	
• cancelled certain step(s): 17	

Figure 5.3 Distribution of decisions in "municipality dataset"

Administration dataset

number of decisions: 344	
decisions on merits: 136	procedural decisions: 208
- proposal by unauthorised person: 7	- withdrawal of proposal: 79
- faultless: 38	- unfounded proceeding: 73
- found misconduct: 91	- deposit not paid: 42
• imposed fine: 22	- unacceptable proposal: 8
• cancelled public procurement: 27	- not delivered in time: 6
• cancelled certain step(s): 42	

Figure 5.2 Distribution of decisions in "administration dataset"

For both datasets the majority of decisions falls into the category of procedural decisions. It may indicate that there is quite large space for potential frivolous proposals or own activity of contracting authorities (which results into unfounded proceeding).

The most frequent reasons for procedural decision are also very similar – among them there are especially withdrawal of proposal, unfounded proceeding (based on general article from Administrative Procedure Act and it happens mainly in the situation when the remedy cannot be awarded (because of various reasons presented further on)) and not paid deposit (as the payment of deposit is fundamental part of the proposal, the Office according to the law automatically stops the proceeding if the deposit is not paid). Finally, in small share of cases the petitioner did not succeed in meeting the deadline for submitting the proposal. The petitioner has typically 10 days to submit the proposal and that can be quite limiting, but the proposal has to be delivered not only to the Office, but also to the contracting authority. This obligation remains sometimes omitted. Unacceptable proposal, which appears only in the "administration dataset", means that the Office is not authorised to decide in that case due to some reason.

The main difference between the distributions of decisions is the relation between numbers of withdrawn proposals and unfounded proceedings in each dataset. In the "administration dataset" the occurrence of withdrawn proposal is less common, but on the other hand there are more unfounded proceedings and the decrease in withdrawn proposals is equal to the increase in unfounded proceedings. It seems that administrative bodies in the role of contracting authorities are a bit more active and impatient during the proceeding compared to the municipalities, because the proceeding is declared as unfounded based on an activity of contracting authority, whereas in the case of withdrawn proposal it is about the petitioner's activity. It may indicate that the administrative bodies prefer to decide about the examined procurement themselves, thus they cancel it on their own or they make a deal even during the ongoing proceeding.

When it comes to decisions on merits, in majority of cases the misconduct is detected. For the analysis I omit the negligible group of proposals submitted by unauthorised person (which means the petitioner was not allowed to turn to the Office in that specific case). In the "municipality dataset", there are two situations when both fine and cancellation of step(s) were imposed.

If we discuss the results of the analysis with official information of the Office taken from annual reports for corresponding years, we can see that our datasets have slightly higher share of procedural decisions (58-60%) contrary to 44-50% based on annual reports from 2012, 2013 and 2014. It would indicate that the participants of the proceeding (contracting authority and petitioner) are more active in my datasets and they use more often the possibility to withdraw the proposal or cancel the procurement. On the other hand the share of found misconducts in the sum of decisions on merits varies between 67-80% according to the annual reports and these numbers correspond also to our results. The more profound grounds of decisions are not provided by the annual reports, but it can be roughly said that our datasets are representative.

5.2.2. International comparison

The situation of the Czech Office can be briefly compared with the situation of Slovakian Office called the Public Procurement Office ("Úrad pre verejné obstarávanie"). The review system in Slovakia is quite similar to the Czech system and as it is our neighbour, the general situation on public procurement field should not be so different. Based on the annual report of the Slovak Office from 2014, the portion of decisions on merits represented 49% and from those decisions there were 76% of cases where the misconduct had been found. The numbers are nearly the same as in the Czech case. Nevertheless, the number of withdrawn proposals in the Czech Republic is approximately twice as large as in Slovakia. The reason for that can be that in Slovakia since 2013 the deposit is not returned fully in the case of withdrawn proposal, but only from 65% of its original size (the same approach has been introduced in the Czech Republic since 2015). The annual report from 2013 does not

confirm this idea though as the number of withdrawn proposals is similar to number from 2014 despite the introduction of this new rule about deposit during the year.

Finally, the problems of frivolous proposal or deposit are discussed also in the United States. Although the institutional position of Government Accountability Office (GAO) is different, the operation of this institution is similar to the Czech Office. Based on Kim (2007), the decisions on merits constitute only about 20-25% (about half of the Czech numbers) of all decisions and from the decisions on merits the misconduct is found only in 20-30% of cases (contrary to 70-80% in the Czech Republic). Those numbers indicate that the proportion of potential frivolous proposals is much larger at the GAO and the basic reason for that is quite simple – there is no obligation to pay a deposit, although it was considered for many times.

5.3. Motivation and incentives in specific cases

The current system is based on an idea that as the firms are maximizing their surplus through the review mechanism, they also maximize the surplus of government (state). However, this idea does not have to be true in all cases – the firms can follow their own objectives. Therefore I analyze motivation and incentives of the participants in different types of cases (with highest frequency of occurrence) based on the real decisions of the Office.

5.3.1. Withdrawal of proposal

The petitioner has quite limited amount of time to submit a proposal and the costs of bare submission are not very high. So it could be rational to use this possibility and postpone the decision making. When the proposal is submitted, the petitioner can now consider many aspects: the probability of success (not only in final situation, but also in reasonable time), the chances to negotiate with contracting authority in order to change his mind and repeat some criticised step of procurement, the costs of proceeding in comparison to potential benefits (costs: money allocated for deposit, lawyers, loss of reputation due to the protest; benefits: potential remedy, business

information about competitors). Finally, if the petitioner regards the costs of participation in procurement as sunk costs and if the petitioner becomes convinced the costs prevails the benefits, he can withdraw the proposal and cut his losses. That is of course legitimate behaviour of petitioner as he optimizes his utility.

However, even in case of legitimate withdrawal of proposal it is accompanied by negative impacts on the whole proceeding (delay, costs etc.), so in order to minimize the total costs, the withdrawal should be done as quickly as possible. As an example of such problem the case of National museum from 2015 (part of "administration dataset") can be mentioned. In that case the proceeding was started based on a proposal, the Office prohibited the Museum from concluding a deal as there was a suspicion of possible misconduct, but after 4 months the proposal was withdrawn (according to the Office just before announcement of decision). The impacts are obvious: the contracting authority lost 4 months by waiting for a decision, the petitioner received the deposit back and the misconduct was not found. If the motivation of petitioner was to cause the delay, to harm the winner of procurement or "to punish" the contracting authority for not choosing him, he probably succeeded.

The primary incentive of petitioner, who withdraws his proposal, is to receive the paid deposit back as it usually represents his highest cost in participation on the proceeding. This incentive was shown also on the practise mentioned in section 3.3.1 (withdrawal of proposal after submission of an appeal). But as results from my dataset show, the amendment of the Government Procurement Act has already prevented this practise – before this change of law there were 13 cases and after the amendment there was only 1 case.

The petitioner, who really seeks a remedy but then he withdraws the proposal, has net benefit equal to nearly zero. However, the petitioner, who follows some other (not so legitimate) goals, can be a "winner" with gained benefit even in case of withdrawn proposal. Such behaviour corresponds to the frivolous proposal, as it was mentioned in section 3.3.2. It is this type of behaviour that should be minimized in order to make the review mechanism more efficient and effective. The simplest way to distinguish

frivolous proposals from the others would be to let the Office decides on merits about each proposal – in that case it would be revealed if there really was some foundation for the protest and if not, the lost deposit would be used as a fine for the petitioner. However, it would mean to deprive the petitioner of discretion about his proposal and it would also cause considerable burden for the Office.

The currently used tools for limitation of frivolous proposals include the deposit (in increasing size) and the rules about not returning the deposit in whole amount. But such measures do not differentiate between different proposals so that they have to necessarily impact also the legitimate proposals. In that case it is also important to consider the fact that the current system supplement the state oversight and if the petitioner's participation in proceeding is not worth it (because of high costs and low potential gains), the oversight will be limited (Matoo, 1996).

Finally, I would assume that the motivation of the Office would be to stop the proceeding because of withdrawal of proposal as soon as possible which means practically at the time of receipt of submission about withdrawing the proposal. But based on my analysis, there are sometimes two weeks and more between the withdrawal of proposal and stop of the proceeding.

5.3.2. Unfounded proceeding

Contrary to the case of withdrawn proposal, it is necessary to investigate the motivation of contracting authority (not petitioner) this time. The proceeding is stopped as unfounded based on some action of contracting authority and there are especially 2 different situations.

In most cases the proceeding is stopped as unfounded based on the cancellation of procurement by the contracting authority himself. This happens very often despite the fact the petitioner demands cancellation of only certain steps made in the process of procurement – the participation in the procurement involves some expenses thus the petitioner does not want to lose this "investment" (if it can be saved). The contracting

authority may cancel the procurement only due to reasons stated in law – typically the contracting authority refers to the reasons worthy special consideration and although the Office can examine also the cancellation, it does not happen very often[14]. There are especially four different incentives for the contracting authorities: attempt to cover a fault, attempt to change inconvenient outcome of procurement by repeating of it with different specifications (whether it is motivated by illegal practise and corruption or legitimate dissatisfaction), loss of promised funds (due to delay in procurement) and time pressure of contracting authority.

In case of cancelled subsidy the contracting authority refers to inability to predict removal of funds, particularly if it was caused by too long review proceeding, and thus he cannot be forced to continue in the procurement as it would be financially unfeasible for him. Net benefit of such situations is negative – the suppliers spent their sources on formation of offers, the contracting authority prepared the procurement and on top of that the petitioner paid the deposit and submitted the proposal, but nobody recorded any profit. When it comes to state subsidies, the money at least remains in the system, but the EU funds have different rules and if they are not exhausted before the end of corresponding financial period, their disbursement is terminated. Furthermore, in the Czech Republic many projects financed through the EU funds are typically procured in the nick of time so every complication has noticeable impacts.

The time pressure is based on impossibility to conclude a deal during the proceeding (although we will see in the next paragraph that the impossibility is questionable). But the need for some goods or services remains and if the need is strong enough (typically purchase of services which cannot be delayed but can be planned in advance, such as cleaning services), the contracting authority is motivated to cancel the current procurement and meet the need quickly in a different way. The suitable solution (for contracting authority) in this situation is usage of special type of

[14] It can be even said that it is quite convenient for the Office to stop the proceeding because of cancelled procurement as it is much easier than investigation of possible misconduct.

procurement procedure (called negotiated procedure without publication) with reference to time pressure. However, the negotiated procedure without publication is the least transparent type of procedure which can be easily used to limit the competition (wiki.zindex.cz) so the contracting authorities should not be motivated to use this procedure.

The second reason for termination of proceeding before the Office as unfounded is the situation when the contracting authority concludes a deal despite the ongoing proceeding and thus the remedy asked by the petitioner cannot be imposed. Although those cases represent only a small share in the whole dataset (about 20 cases out of 486 in total), they represent potentially significant problem. It can be quite easily hidden potential misconduct of contracting authority with such a practise. Moreover if we also consider the current approach of the Office, that stops the proceeding and does not continue in examination of possible misconduct, there are only two barriers for contracting authority[15]: preliminary injunction (which is not always granted by the Office, if I look at the annual reports from 2012-2014, I can see that the number of granted preliminary injunctions decreases through the time contrarily to the increasing number of revealed misconducts) and risk aversion of contracting authority (in case the misconduct would be uncovered after all and some fine would be imposed). On the other hand the contracting authority can be motivated to conclusion of a deal due to fear of frivolous proposal and fear of unnecessary delay in procurement. Some of those contracting authorities even wait until the decision of the first instance (which does not find any misconduct) and then (during the appeal of dissatisfied petitioner) they conclude the deal. Thus there is a question of length of the proceeding again as it influences the behaviour and incentives of the participants. Anyway, the Office continues in current approach towards those cases despite the criticism of the court.

[15] Unless we include the 45 days of automatic stay provision since the submission of objections as this time period is quite short with regard to the length of proceeding before the Office.

5.3.3. Deposit not paid

The number of cases of not paid deposit is so high, that it indicates presence of several incentives. The mere mistake of petitioner seems to represent only one of them. In the rest of examples there can be an intention (not to pay the deposit) of petitioner who follows various goals: another form of frivolous proposal (because also in this situation, when the petitioner does not pay the deposit, the 45 days automatic stay provision is used until the termination of proceeding) or attempt to draw attention to specific procurement (in 2014 there were 988 public initiatives and some petitioners believe that such initiative does not have high probability to result in proceeding ex officio so they submit a proposal in order to draw attention of the Office). The incentive to submit a frivolous proposal without payment of deposit has been significantly reduced after the last amendment of the Government Procurement Act that shortened the period for paying the deposit (10 days since receiving the opinion about the objections from the contracting authority) and that set down automatic termination of proceeding based on the not paid deposit. This implies the restriction for contracting authority has been decreased.

5.3.4. Found misconduct

In cases of found misconducts the motivation of participants is quite clear – the petitioner demands sort of redress as he believes the contracting authority committed a fault and such fault causes a loss for the petitioner. For the petitioner it is generally favourable and less costly, if the fault can be redressed only by cancellation of certain steps, not the whole procurement.

Based on the analysis of the datasets, among the most frequent types of misconduct we find intransparent qualification requirements and inadequate definition of subject of procurement (both redressed by cancellation of procurement), intransparent or even incorrect evaluation of offers followed by incorrect elimination of bidder or incorrectly not followed by elimination of bidder. In those cases the problematic actions were cancelled. Among other registered misconducts there is

incorrect cancellation of procurement from the side of contracting authority, omission to publish obligatory information before or after the procurement procedure or illegal usage of negotiated procedure without publication.

If there is revealed the administrative offence of contracting authority, the fine is imposed on him by the Office. The total sum of imposed fines is 1.405.000 CZK in "municipality dataset" (with 13 imposed fines) and 6.299.000 CZK in "administration dataset" (with 23 imposed fines) but the ratio of in fact imposed fine to maximum possible level stated by law is more interesting. If we consider 100% as the upper limit up to which the Office can impose the fine, the actual size of fine most often varies between 1 - 5% (in case of offence for which the upper limit of fine is determined as a fraction of the value of procurement) and between 0,1 - 1% (in case of offence for which the upper limit is fixed and stated by law). For both groups there are exceptions in the datasets – in 3 cases the fines climbed up to 33%, 20% and 10% respectively. On the other hand, there were also 6 cases with amount of fine less than 0,1% of the upper limit (all of them rather technical faults connected to obligation to publish all relevant documents). Thus we can see that the size of imposed fines is rather low with regard to the maximum allowable size. The Office has already been criticized for such low fines in past and even today it can be said there is space for their increase.

Furthermore, there is also question whether the fines have intended impact. Theoretically, the role of fine is repression and prevention.[16] However, there are discussions whether these roles are really fulfilled or if the fine only circulates in the system from one public body to another with no direct impact. Pavel (2009) argues that for the effective review system it is necessary to look for the responsible person and to recover damages (the fine) from her. Based on his study, less than 50% of contracting authorities (who committed misconduct) determined the responsible person and demanded the compensation for damages.

[16] According to the size of average fine, the Office tends to prefer the prevention to repression, because otherwise the fines would be higher in order to severely punish the wrongdoer.

5.4. Length of proceeding

As it was mentioned on many places throughout this thesis, the question of length of the proceeding before the Office is very important and it has some impact on many aspects of the review mechanism. Due to that I also analyzed this issue – I examined different aspects of the proceeding and decision and their influences on the length of the proceeding.

First, based on the histogram of dependant variable (length of the proceeding) I determined 3 outliers – 3 cases that the Office examined and whose length amount to 1168 days, which is about 30% higher value than the second longest case. All 3 cases are closely related together (all of them are procurement of cleaning services in different parts of one city) and based on the circumstances of the cases I did not include them in the dataset for current analysis in order not to have biased results.

Next I examined whether I was allowed to join the "administration" and "municipality" dataset together into one single dataset. Based on the results of the Chow test (p-value = 0,02) I decided to run separate regression for each dataset.

My final model (for both datasets) is in the form

$$length_i = \beta_0 + \beta_1 * merits_i + \beta_2 * withdrawal_i + \beta_3 * deposit_i + \beta_4 * unfounded_i + \beta_5 * appeal_i + \beta_6 * returned_i + \varepsilon_i$$

where *i* denotes each decision, variable *length* means length of the proceeding, variables *withdrawal, deposit, unfounded* and *merits* describe the nature of the decision (each decision can satisfy only one of these variables and the rest of decisions is included in the constant), variables *appeal* and *returned* denote whether the appeal was used in the case and whether the case was returned to the first instance (due to successful appeal). All independent variables are dummy variables. For the data analysis I used program STATA 11.2.

Administration dataset

length	coefficient	std. err.	p-value
merits	42,77	21,11	0,044
withdraw	-39,77	19,62	0,043
deposit	-30,55	20,87	0,144
unfounded	-3,13	20,82	0,880
appeal	257,34	17,81	0,000
returned	281,40	75,64	0,000
_cons	90,94	18,53	0,000

Municipality dataset

length	coefficient	std. err.	p-value
merits	79,34	18,27	0,000
withdraw	-18,55	14,85	0,214
deposit	-26,71	15,00	0,077
unfounded	-4,52	19,32	0,815
appeal	231,11	29,38	0,000
returned	132,82	67,87	0,052
_cons	94,77	12,50	0,000

Figure 5.4 Results of the analysis of length of proceeding

I also ran Breusch-Pagan test for each dataset in order to find out whether there was a heteroskedasticity and thus whether one of the conditions of OLS was breached. For both datasets I strongly rejected the null hypothesis (p-value = 0,00 in both cases) of constant variance so I used robust OLS.

The value of R-squared is for both cases approximately 0,70 so the model explains about 70% of the variation in the *length* variable. As it follows from the Figure 5.8, the only one highly insignificant variable is variable *unfounded*. In both datasets its p-value is above 0,8 and its coefficient is close to zero.

The variables *deposit* and *withdraw* are significant at (at least) 10% significance level only in one dataset, in the other one they are slightly insignificant. Nevertheless, their coefficients point out the same pattern – the decisions based on withdrawn proposal or not paid deposit are on average published earlier than other procedural decisions (about 30 days earlier for not paid deposit and about 20-40 days earlier for withdrawn

proposal). But for both situations it means that the decision is made approximately in 60 days since the start of proceeding which is quite long time.

The variables *merits, appeal and returned* are significant at 5% level in both datasets. Although their coefficients differs between the two datasets (especially in case of *returned* variable), their messages are similar. The Office needed approximately 130 days for decision on merits in "administration dataset" and 170 days in "municipality dataset" (just to remind, as it was mentioned in section 3.2, the Office should decide the case in no more than 60 days). For the result of an appeal the participant had to wait on average another 230-260 days. Due to the low number of returned cases, the coefficients of *returned* variable differ a lot – yet they still mean that if the president of the Office returned the case back to the first instance, the proceeding lasted on average another more than 130 days. In hypothetical example of decision on merits, where the participant succeeds with his appeal and the case is returned to the first instance, the proceedings can last more than year and half. In addition the participant has again the right to appeal and if he uses all his rights before the Office, there is still possibility to submit an action to court.

Among other impacts mentioned in the previous text, the length of the proceeding has also influence on the deposit. The deposit is retained until the legally effective decision is made and if there is a right to obtain the deposit back, the Office has 30 days since the date of coming into force for the pay out. Thus if we consider the average length of the proceeding, the petitioner misses his money for quite long time. Especially during the periods of financial distress this negative effect can affect the potential petitioners.

On the other hand, the length of the proceeding does not depend only on the Office. The contracting authority is obliged to provide the Office with necessary documents and based on his quickness to comply with this obligation, the proceeding can be delayed. Nonetheless, the Office can primarily make an appeal to the contracting authority in order to alert him and alternatively the contracting authority

can be fined up to 1.000.000 CZK for an administrative offence - though such case was not detected during my analysis.

Brief look abroad shows that for example in the USA the Government Accountability Office has 100 days for the decision, the deadline is binding for the office and this time deadline is not fulfilled only in extraordinary cases, the cases are rather decided much earlier (Schwartz, Manuel, Martinez 2013). In Poland the office has 15 days and even though it is only instructive limit, the office often decides within 10 days (Cichocki, Mlodawski, Pawlak, Wyszomirksi 2012).

5.5. Success rate of appeals and actions to court

The right to submit an appeal belongs to every participant of proceeding who considers the decision of the first instance incorrect. The use of such right however significantly prolongs the whole proceeding. As it was also mentioned in section 3.4, there are several countries in which the supervisory institution has only one instance. Thus it is useful to analyze the institute of appeal – its rate of use (whether the appeal is used in all cases or nearly never) and success rate. The appeal is considered as successful if the president of the Office changes the original decision or returns the case back to the first instance. Eventually, the first instance can decide equally as for the first time so for the economic actors (who are not primarily interested in the questions of law but rather in economic impacts) it is useful to find out in what percentage of appeals the decision is altered in favour of him after all.

Based on my analysis, the appeal was used in 22% of cases for both datasets (but it includes also cases where there is no dispute, for example cases with withdrawn proposals) so the use of this right is not automatic for every case. In case of submitted appeal for “municipality dataset” the appeal was successful in 26% of cases, in 16% of cases the proceeding was stopped (because of withdrawal of proposal or because the proposal became unfounded) and in 58% of cases the president of the Office confirmed the original decision. The results for “administration dataset” slightly differ

– the success rate was only 12%, 16% of cases were stopped and 72% of cases were confirmed. The difference in success rate can be caused by too low number of appeals in “municipality dataset”.

Nevertheless, the successful appeal, which returns the case back to the first instance, means another delay of the proceeding (see the previous section) and the positive (in terms of real change of decision) result for the appellant is not ensured. On the contrary the frequent reason for cancellation of original decision during the appeal procedure is unverifiability of decision, which means the president of the Office criticizes lack of substantiation, whereas the typical economic participant of the proceeding is primarily interested in the final result which has (or can have) the impact on his situation (for example fine for the contracting authority or possibility to continue in the procurement procedure for the petitioner). Thus the typical economic participant is mainly concerning whether the appeal brings the real change of the original decision – and from the analysis it follows that the real change is quite infrequent. In the “municipality dataset” there were 31 appeals in total, but only 2 appeals resulted in change of original decision, in the “administration dataset” there were 74 appeals in total and only 1 appeal brought change for the appellant (in 3 other cases there had been successful appeals but the first instance has not decided yet).

I can compare my results with values from the annual reports (years 2012-2014), but they include appeals against all decisions of the first instance (including the preliminary injunctions etc. which are not covered into my dataset). Nonetheless, the numbers are quite similar – on average, the president of the Office confirms 60-70% of decisions from the first instance, he returns back about 10-20% of decisions and in the rest of cases the president stops the proceeding. In addition there is interesting time trend – between years 2012 and 2014 there was decrease both in confirmed and returned decisions, on the contrary the number of stopped proceedings significantly increased. Regarding the results of my analysis, where the number of stopped proceedings due to withdrawal of proposal during the appeal greatly reduced after year 2012 (because the petitioner did not receive the deposit back anymore in this

situation), the reason for this increase is unfounded proposal. It may indicate higher effort of contracting authorities to terminate the proceeding by their own activity – for example due to the too high delay in the procurement. From the annual reports it follows another one interesting trend. Although between years 2012 and 2014 the number of decisions of the first instance (including preliminary injunctions etc.) was quite stable around 1000 decisions per year (+-5%), the number of submitted appeals has been increasing by approximately 10% every year.

To sum up, although the right to appeal is used to quite significant extent, the absolute majority of appeals finished by dismissal, the large portion of appeals led to stop of the proceedings (due to the reasons mentioned in section 5.3) and only very small share of appeals resulted into the modification of original decision.

5.6. Success rate of actions to court

It is possible to bright an action before the court only after use of the appeal before the Office. From the official numbers of the Office it follows that although there is considerable increase of solved appeals by the president over time (from number 229 in year 2012 to number 368 in year 2014), the quantity of actions to court is stable or rather descending (52 actions in year 2012, 42 actions in year 2014). The success rate of action also decreases – in year 2012 the court abolished the decision of the Office in 50% of the cases, but in year 2014 it was only 39%. During my analysis I did not find out any action in the "municipality dataset", but I found out 7 actions in the "administration dataset". In those 7 cases of actions the plaintiff succeeded in 3 cases which correspond to the total numbers of the Office. Though there seems to be similar problem as in the case of appeal procedure – during 2 out of 3 successful trials it was mentioned that the contracting authority has already made a deal or cancelled the procurement procedure. So with regards to current decision-making of the Office it is not surprising the Office stopped the proceeding as unfounded (or it will not be surprising as one case is still to be decided). Finally, the numbers of actions in my

datasets may increase in the future as they come from information about already finished trials (without the ongoing trials).

6. Conclusion

The aim of this thesis was to analyze the decisions of the Czech Office for the Protection of Competition and based on that analysis I inquired the motivation for specific behaviour of participants of proceedings. In addition, the length of the proceeding and the success rates of appeal and of action to court were also in my concern.

The results of the analysis are presented in Chapter 5. The Office oversights less than 3% of all public procurement in the Czech Republic and most reviews are started based on the proposal from petitioner.

From the analysis of decisions it follows that among the most frequent reasons for decision there are withdrawal of proposal, unfounded proceeding, not paid deposit and found misconduct. The withdrawal of proposal and not paid deposit are connected to the topic of frivolous proposal and it cannot be denied that some of the proposals can be in fact the frivolous proposals. On the other hand, the oversight system is based on proposals so the petitioners should not be discouraged from submission of proposals. The cases of unfounded proceedings are primarily connected to the motivation of contracting authorities to avoid the review proceeding – both in case of conclusion of a deal despite the ongoing proceeding (that can be quite easily used to hide any misconduct) and in case of cancellation of procurement (with its impact on potential subsidy). In case of found misconduct the fines imposed by the Office are rather low compared to the maximum levels.

The length of proceeding before the Office tends to be quite high. Even though the Administrative Procedure Act states the maximum length as 60 days, the Office needs 60-90 days for the procedural decision and 130-170 days for decision on merits on average. The appeal or new proceeding before the first instance takes more than half a year for each. The length could be shortened by various means: decrease in number of

proposals and public initiatives (but this leads to reduction in oversight and the total costs would be probably higher), the increase in number of employees of the Office (the number of employees has been raised in recent years so perhaps it will bring positive change) or modification of system (both on systemic level, for example abolition of appeal procedure, and on personal level, that is higher education and training of employees).

The analysis of appeals shows that the president of the Office rejected about 60-70% of appeals, he returns the case back to the first instance in about 10-20% and similarly large share of cases he stopped. However, if I consider only the final decisions of the Office (without any further appeals), the use of right to appeal leads to change of original decision in only very small percentage of cases. It is because the first instance usually remains with its initial opinion thus the most significant result of appeal is very often the delay in whole procurement procedure (up to one year and more). The success rate of action to court is below 50%.

As there is being prepared a draft of the new government procurement act, the future investigation in the field of this thesis depends on its content.

Literature

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